

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re:

TERESA VALENCIA,

Movant.

No. 07-4262
(D.C. Nos. 07-CV-919-DAK,
03-CR-201-PGC,
2:07-CV-00919-DAK &
2:03-CR-00201-PGC)
(D. Utah)

ORDER

Before **MURPHY, HARTZ, and HOLMES**, Circuit Judges.

Movant Teresa Valencia, a federal prisoner proceeding pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct her sentence. We deny authorization.

Valencia was convicted in 2003 of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). She did not file an appeal. She did file a § 2255 petition, which was dismissed by the district court as untimely. *See United States v. Valencia*, 472 F.3d 761, 762-63 (10th Cir. 2006) (describing procedural history and denying a certificate of appealability).

To obtain authorization to file a second § 2255 motion, Valencia must demonstrate that her proposed claims either depend on “newly discovered

evidence that, if proven” would “establish by clear and convincing evidence that no reasonable factfinder would have found [her] guilty,” or rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255 para. 8.

Valencia seeks to present a habeas claim that her criminal history should not have been used as a sentence enhancement. She does not challenge any particular aspect of her criminal history calculation, but rather claims generally that her prior crimes should not have been used to increase her sentence. She acknowledges that she raised this claim in her prior § 2255 motion, but states that she is relying on two recent Supreme Court cases, *Gall v. United States*, ___ U.S. ___, 128 S. Ct. 586 (2007), and *Kimbrough v. United States*, ___ U.S. ___, 128 S. Ct. 558 (2007). The holdings of these decisions have no relevance to Valencia’s general objection to the use of her prior criminal history as a sentence enhancement, nor has the Supreme Court made *Gall* and *Kimbrough* retroactively-applicable on collateral review to convictions that were final at the time these cases were decided by the Supreme Court. *See* 28 U.S.C. § 2255 para. 8.

Accordingly, we deny authorization. This denial of authorization is not appealable and may not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk